

IN RE: ) In Proceedings  
 ) Under Chapter 12  
KENNETH G. COMER and )  
GLEENDA S. COMER, ) No. BK 87-30273  
 )  
Debtors. )

in the crops. The 1986 operating loan was paid in full on December 15, 1986, although \$119,316.60 remains due on the renewal note.

Illinois law provides that "a filed financing statement is effective for a period of 5 years from the date of filing." Ill.Rev.Stat. ch. 26, ¶9-403(2). The Bank's December 8, 1980 financing statement therefore expired December 7, 1985. Paragraph 9-403 further provides:

A continuation statement may be filed by the secured party within 6 months prior to the expiration of the 5 year period specified in subsection (2)...Upon timely filing of the continuation statement, the effectiveness of the original statement is continued for 5 years after the last date to which the filing was effective....

Ill.Rev.Stat. ch. 26, ¶9-403(3) (emphasis added). Debtors and FMHA claim that the continuation statement filed by the Bank was ineffective since it was not filed within six months prior to the expiration of the original financing statement. The Bank claims that the premature filing of its continuation statement was "harmless error." Alternatively, the Bank contends that it has a first lien purchase money security interest in debtors' 1986 crops pursuant to Ill.Rev.Stat. ch. 26, ¶9-312(2).

No Illinois case has addressed the question of whether continuation statements must be filed within the six months preceding the expiration of the original financing statement. However, other decisions involving identical statutory provisions have addressed this issue. In the case of In re Hays, 47 B.R. 546 (Bankr. N.D. Ohio

1985), the court held that "this section of the Uniform Commercial Code, as adopted in the various states, does not permit continuation statements to be filed prior to the beginning of the six month period which preceeds [sic] the expiration of a financing statement." Id. at 550. "Timely filing...clearly means filing within the time provided therein. A continuation filed prior to the six month period is not timely filed and cannot have the effect of continuing the original statement." Id. See also Matter of Hubka, 64 B.R. 473, 476 (Bankr. D. Neb. 1986) (continuation statement filed prior to the six month period causes the perfection of a security interest to lapse).

The Court agrees with the decisions in Hays and Hubka, and holds that continuation statements must be filed within six months prior to the expiration of the original financing statement. Not only does the statutory language suggest this result, but policy reasons also justify this conclusion. As noted by counsel for debtors, if continuation statements could be filed before the six month period, a secured creditor could file such a statement one day after the filing of the original financing statement. The perfection period would thus be extended for ten years (five years for the original statement and another five years for the continuation), "clearly circumventing the legislative intent that a financing statement is effective for only five years." (Debtors' Brief, p. 7).

The Bank also contends that it has a first lien purchase money security interest in debtors' 1986 crops pursuant to Ill.Rev.Stat. ch. 26, ¶9-312(2). That statute provides:

A perfected security interest in crops for new

value given to enable the Debtor to produce the crops during the production season and given not more than three months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.

Ill.Rev.Stat. ch. 26, ¶9-312(2).

On May 15, 1986 debtors obtained an operating loan from the Bank for 1986 farm operating expenses. The note was to be paid in full by December 15, 1986, and was in fact fully paid on that date. In conjunction with that loan, debtors executed a security agreement, also dated May 15, 1986, which gave the Bank a security interest in all future crops. A financing statement covering growing and harvested crops was filed by the Bank on May 17, 1986. On June 30, 1986 debtors executed another note with the Bank for \$119,316.60. This note was a business farm equipment renewal note and payment was due on May 31, 1987. No payment has yet been made. This note specifically references the May 15, 1986 security agreement, which, as previously noted, gave the Bank a security interest in all future crops.

Paragraph 9-312(2) expressly provides that "new value" must be given in order for a creditor to obtain a purchase money security interest in crops. The comments to that section provide, "Subsection (2) gives priority to a new value security interest in crops based on a current crop production loan over an earlier security interest in the crop which secured obligations...due more than six months before

the crops become growing crops." Ill.Rev.Stat. ch. 26, ¶9-312, Uniform Commercial Code Comment (emphasis added). In the present case, the May 15, 1986 operating loan was paid in December 1986. Therefore, the new value given to debtors to produce the 1986 crops has already been paid in full. In other words, any purchase money security interest created by the May 15th loan ceased to exist once that loan was paid. The Bank argues that the June 30th renewal note also constitutes new value. However, as debtors correctly state, that note was a business farm equipment renewal note, not a crop production loan, and the Bank therefore cannot invoke the protection of section 9-312(2).

Policy reasons also support this result. If the Court were to adopt the Bank's position, a creditor could make a current crop production loan and at the same time "boot strap" other non-operating loans, thereby obtaining the protection of section 9-312(2) for both the operating and non-operating loans. The Court does not believe that section 9-312(2) was intended for that purpose. For these reasons, the Court finds that FMHA has a first lien on debtors' 1986 crops.

The Bank also objects to debtors' proposed plan on the basis that it omits any reference to certain stock owned by Kenneth Comer, or to dividend income from the stock. Kenneth Comer owns seventeen percent of the common stock in Lincoln Avenue Diversified, Inc. ("L.A.D."), a closely held corporation. L.A.D. owns a restaurant in Urbana, Illinois, which is leased to Jeffrey J. Pentz until May 31, 1992, with options to renew for three additional terms of five years

each. Debtors wish to retain their minority interest in the stock and to include their stock dividends as disposable income under section 1225(b)(1)(B). The Bank contends that debtors' L.A.D. stock is a valuable asset that should be sold so that the proceeds of such sale can be used to pay creditors who are unsecured and undersecured. In response, debtors claim that under a certain Restrictive Share Purchase Agreement ("Agreement"), their stock has little, if any, value and that any sale of the stock would therefore not maximize the return to unsecured creditors.

The Agreement in question provides that the corporation or shareholders may exercise an option to purchase any shareholder's stock prior to that stock being made available for sale to the general public. Additionally, the Agreement apparently allows the shareholders or the corporation to purchase the shares at a nominal price by determining, at any time, the "net worth" of the corporation. (Agreement, ¶¶503,505). According to debtors, since any shareholder can buy debtors' interest for a nominal price, Their stock, if sold, would have only nominal value.

The Bank argues that the Agreement is invalid under section 541(c)(1)(A), which provides:

Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under Subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument or applicable non-bankruptcy law -

(A) that restricts or conditions transfer of such interest by the debtor ....

11 U.S.C. §541(c)(1)(A). The Court does not believe that section 541 was intended to invalidate the type of Agreement at issue in this case. "Section 541(c)(1)(A)...avoids only those restrictions which prevent transfer of the debtor's property to the estate." In Re Farmers Markets, Inc., 792 F.2d 1400, 1402 (9th Cir. 1986). The Agreement in this case does not prevent transfer of the debtors' property, but requires only that the corporation or shareholders be allowed to exercise an option to purchase debtors' stock.

The Court also finds, however, that it is impossible to determine the value of debtors' stock unless the stock is offered for sale to the corporation and its shareholders. Debtors shall, therefore, within 45 days, provide documentation or other proof to the Court which establishes that the stock has been offered for sale in accordance with the Agreement, and that its value is less than the discounted value of stock dividend payments over a three year period.

Accordingly, the Bank's objections to debtors' Chapter 12 Plan are OVERRULED in part. The Bank's objection with regard to debtors' stock in L.A.D. is reserved until after the Court receives the documentation or other proof from the debtor or the expiration of 45 days, whichever is sooner.

\_\_\_\_\_/s/ Kenneth J. Meyers\_\_\_\_\_  
U.S. BANKRUPTCY JUDGE

ENTERED: November 30, 1987